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No. 82-6614

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1982

ASTRID GALINDO SARDOZ and
MARIA SOTO VDA DE TALAMANTES
as co-personal representatives
of the Estate of BERNARDO TALAMANTES,
a/k/a HECTOR M. BAYLON, deceased,

Appellants,

vs.

KENT NOWLIN CONSTRUCTION COMPANY,

Appellee.

ON APPEAL FROM THE SUPREME COURT
OF THE STATE OF NEW MEXICO

MOTION TO DISMISS OR AFFIRM

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MOTION TO DISMISS OR AFFIRM

Appellee moves the Court to dismiss the appeal herein, or in the alternative, to affirm the decision of the Supreme Court of New Mexico, on the grounds that the question actually raised in this appeal was not preserved as an issue in the trial court and, further, it is manifest that the issue which was preserved and on which the decision of the cause depends is so insubstantial as to need no further argument.

I. THE STATUTES INVOLVED AND THE NATURE OF THE CASE.

A. The Statutes.

Although the question presented at the outset of the Jurisdictional Statement refers only to the "Exclusive Remedy" provisions of the New Mexico Workmen's Compensation Act (§§ 52-1-8 and 52-1-9 NMSA 1978), Appellants' argument in their Jurisdictional Statement is actually based upon the "confluence" of distinct and separate statutes--the Exclusive Remedy provisions, and the "Exclusion" provision (§ 52-1-52 NMSA 1978). None of these statutes involve alienage in any way. The Exclusive Remedy provisions apply to all persons, regardless of their citizenship or residence, while the Exclusion provision differentiates only on the basis of residence within or without the United States. Appellants' continued references to "alienage" are simply misstatements of the issue.

The Appellants have misstated the issue in an effort to create jurisdiction in this Court. The real thrust of this appeal is not whether the Exclusive Remedy provisions are constitutional or unconstitutional, but whether the provision of the New Mexico Workmen's Compensation Act which excludes non-United States resident dependents and relatives of an injured workman from recovery of any benefits is

constitutional. It is this Exclusion provision, not the Exclusive Remedy provisions, which barred the deceased workman's family from any recovery beyond the medical and funeral expenses which were paid pursuant to the New Mexico Workmen's Compensation Act. The Exclusion provision, however, could not be appealed in the context of this case, because the Appellants did not litigate or attempt to litigate a workmen's compensation claim for the recovery of benefits, nor did they preserve the issue of the constitutionality of the Exclusion provision or file a timely appeal on that question.

The relevant statutory provisions in this case are Sections 52-1-8, 52-1-9 (the Exclusive Remedy provisions), and 52-1-52 (the Exclusion provision) NMSA 1978, which read as follows:

> EXCLUSIVE REMEDY PROVISIONS:
>
> 52-1-8. Defenses to action by employee. In an action to recover damages for a personal injury sustained by an employee while engaged in the line of his duty as such, or for death resulting from personal injuries so sustained in which recovery is sought upon the ground of want of ordinary care of the employer, or of the officer, agent or servant of the employer, it shall not be a defense:
>
> A. that the employee, either expressly or impliedly, assumed the risk of the hazard complained of as due to the employer's negligence;
>
> B. that the injury or death was caused, in whole or in part, by the want of ordinary care of a fellow servant; and
>
> C. that the injury or death was caused, in whole or in part, by the want of ordinary care of the injured employee where such want of care was not willful.
>
> Any employer who has complied with the provisions of the Workmen's Compensation Act [52-1-1 to 52-1-69 NMSA 1978] relating to insurance, or any of the employees of the employer, including management and supervisory employees, shall not be subject to any other liability whatsoever for the

death of or personal injury to any employee, except as provided in the Workmen's Compensation Act, and all causes of actions, actions at law, suits in equity and proceedings whatever, and all statutory and common-law rights and remedies for and on account of such death of, or personal injury to, any such employee and accruing to any and all persons whomsoever, are hereby abolished except as provided in the Workmen's Compensation Act.

* * *

52-1-9. Right to compensation; exclusive. The right to the compensation provided for in this act [52-1-1 to 52-1-69 NMSA 1978], in lieu of any other liability whatso- ever, to any and all persons whomsoever, for any personal injury accidentally sustained or death resulting therefrom, shall obtain in all cases where the following conditions occur:

A. at the time of the accident, the employer has complied with the provisions thereof regarding insurance;

B. at the time of the accident, the employee is performing service arising out of and in the course of his employment; and

C. the injury or death is proximately caused by accident arising out of and in the course of his employment and is not intentionally self-inflicted.

* * *

EXCLUSION PROVISION:

52-1-52. [Exemption of compensation from claims of creditors, attachment, garnishment or execution; payees; residents of foreign countries barred from receiving payment.] Compensation shall be exempt from claims of creditors and from any attachment, garnishment or execution, and shall be paid only to such workman or his personal representative, or such other persons as the court may, under the terms hereof, appoint to receive or collect the same. No claim or judgment for compensation, under this act [52-1-1 to 52-1-69 NMSA 1978], shall accrue to or be recovered by relatives or dependents not residents of the United States at the time of the injury of such workman.

B. The Proceedings Below.

This matter arises out of an industrial accident that resulted in the death of Bernardo Talamantes ("Decedent") on or about November 25, 1977. Decedent was a citizen of Mexico. Prior to his death, he illegally entered the United States and obtained employment under the name of Hector M. Baylon. All of Decedent's relatives and dependents were residents of Mexico at the time of his death.

In May 1978, a personal representative of the estate of Decedent filed suit in Bernalillo County, New Mexico. The named defendants included Kent Nowlin Construction Company, Inc. ("Kent Nowlin"), Decedent's employer at the time of his death; and Mountain States Mutual Casualty Company ("Mountain States"), Kent Nowlin's workmen's compensation insurance carrier. A true and correct copy of the Complaint is attached hereto and made a part hereof as Appendix "A". Count One of the Complaint was a workmen's compensation claim against Kent Nowlin and Mountain States. In relevant part, it asserted:

> VI. Notwithstanding the provisions of Section 59-10-21, N.M.S.A., the widow and children of Bernardo Talamantes are entitled to Workmen's Compensation benefits pursuant to the New Mexico Workmen's Compensation Act. Such purported limitation in that section is unconstitutional and should be stricken by the court.[1]

Count Two of the Complaint was couched in terms of a wrongful death action against Kent Nowlin. In pertinent part, that Count stated:

---

[1]Section 59-10-21 NMSA (1953 Comp.) was the non-U.S. resident dependent exclusion in the 1953 Compilation of the New Mexico Statutes Annotated. Section 52-1-52 NMSA 1978 is the same statute in the current compilation.

> II. In the alternative to the allegations contained in Count One, the Plaintiffs state that the Workmen's Compensation Act does not apply to the death of Bernardo R. Talamantes. Plaintiffs are entitled to proceed in common law.

Therefore, Appellants originally proceeded against Kent Nowlin on the alternate theories of workmen's compensation and wrongful death (in the event that the non-United States resident dependent Exclusion provision of Section 52-1-52, supra, proved to be valid.)

At the time the Complaint was filed, there was already pending in the New Mexico Supreme Court the case of Pedrazza v. Sid Fleming Contractor, Inc., 94 N.M. 59, 607 P.2d 597 (1980), a workmen's compensation action which involved the constitutionality of the Exclusion provision. The plaintiffs in Pedrazza were residents of Mexico and were the dependents of a Mexican citizen who was killed in an industrial accident while working in the United States. The Pedrazza plaintiffs were claiming benefits under the New Mexico Workmen's Compensation Act and were challenging the constitutional validity of the Exclusion provision.

With Pedrazza already pending in the New Mexico Supreme Court, the parties to the instant case filed a joint motion for a stay of proceedings until Pedrazza was decided. The motion was granted and both parties herein then participated in the Pedrazza appeal as amicus curiae.

In February, 1980, the New Mexico Supreme Court held in Pedrazza that the Exclusion provision was constitutional. In July 1980, Appellants moved to amend their Complaint to dismiss their workmen's compensation claim and proceed against Kent Nowlin only on the wrongful death claim. Copies of the motion and First Amended Complaint are attached hereto and made a part hereof as Appendices "B" and "C". The Order granting

the Appellants' motion was entered on August 6, 1980, and specified that the workmen's compensation claim was dismissed with prejudice. A copy of the Order is attached hereto as Appendix "D". The Order recited, however, that Kent Nowlin's workmen's compensation insurer had paid to the Appellants medical and funeral expenses for the death of the Decedent. (These benefits do not fall within the Exclusion by virtue of Section 52-1-46 NMSA 1978.)

The case then proceeded as a wrongful death action against Kent Nowlin. Kent Nowlin raised the defense of Sections 52-1-8 and 52-1-9, supra, the Exclusive Remedy provisions. That issue was preserved for appeal throughout the proceedings and the New Mexico Supreme Court ultimately ruled that the Exclusive Remedy provisions did bar the Appellants' wrongful death action against Kent Nowlin, holding:

> ...The plain meaning of these provisions is that the Act is an exclusive remedy, unless otherwise provided for in the Act. The Act does not make an exception, and we will not create one. * * * We hold that non-resident dependents residing outside of the United States at the time of the worker's injury are barred from pursuing their common law remedies due to the exclusive remedy provisions under the Act. To hold otherwise would subject employers to unlimited liability and defeat the underlying principles of the Act. 658 P.2d at 1117, 1118.

Appellants have appealed to this Court claiming that there is a Federal Constitutional issue based upon the New Mexico Supreme Court's interpretation of the Exclusive Remedy provisions of the New Mexico Workmen's Compensation Act. This is a misstatement designed to overcome the fact that Appellants failed to preserve the issue of the constitutionality of the Section 52-1-52 Exclusion provision.

II. ARGUMENT

The Issue Raised In The Jurisdictional Statement Was Not Preserved For Appeal. Even If It Had Been Preserved The Case Presents No Substantial Constitutional Question Requiring Further Argument.

The Exclusive Remedy provisions are neutral in their operation--they operate against all classes of persons equally whether they be United States citizens or aliens. The Appellants' real quarrel is with the Exclusion provision of the New Mexico Workmen's Compensation Act, and they have recognized that fact in the Jurisdictional Statement with the following language:

> This construction of the exclusive remedy provision when considered in tandem with Section 52-1-52 of the Act absolutely bars the Talamantes family from any claim for the wrongful death of Bernardo Talamantes. Section 52-1-52 denies recovery otherwise available under the Act to a worker's alien relatives or dependents if they are residing outside of the United States at the time of the worker's injury....(Jurisdictional Statement, p. 4).

Assuming, arguendo, that there is a Federal Constitutional question involved here, that question must turn on the validity of the Exclusion provision. Appellants' problem is that they have failed to either properly preserve that issue for appeal or to file a timely appeal on that question. As stated above, they originally filed a workmen's compensation claim against Kent Nowlin but then voluntarily amended their Complaint in 1980 to abandon that claim with prejudice. They did not again raise the question of the validity of the Exclusion at any point in the trial or the appellate process.

Appellants elected to try this action as a wrongful death action, not a workmen's compensation case. They now appeal from the fact that they are not allowed to maintain the wrongful death action in the face of the clear mandate of the

New Mexico Exclusive Remedy provisions. The Exclusion provision was not challenged in this case, and the claim for a recovery of workmen's compensation benefits was, in fact, abandoned when the Appellants voluntarily amended their Complaint in the trial court. Therefore, it would be inappropriate for them to now challenge on appeal the constitutionality of the Exclusion provision. Cf. Usery v. Turner Elkhorn Mining Co., 428 U.S. 1, 37 (1976); Head v. N.M. Board of Exam. in Optometry, 374 U.S. 424, 432 n.12 (1963).

If the Appellants are not, in fact, implicitly challenging the constitutionality of the Exclusion provision, but are challenging only the Exclusive Remedy provisions, then the decision of the New Mexico Supreme Court should be summarily affirmed. The Exclusive Remedy provisions are typical of workmen's compensation statutes. This Court in United States v. Demko, 385 U.S. 149, 151 (1966), reiterated its recognition of the fact that workmen's compensation actions are substitutes for, not supplements to, common-law tort actions, reaffirming its holdings in Johansen v. United States, 343 U.S. 427 (1952), and Patterson v. United States, 359 U.S. 495 (1959). The constitutionality of exclusive remedy provisions, when attacked, has repeatedly been upheld. That issue was resolved by this Court in 1916 in Northern Pacific Railway Co. v. Meese, 239 U.S. 614, 620 (1916). More recent decisions from the Courts of Appeals have reached the same results. Davidson v. Hobart Corp., 643 F.2d 1386 (10th Cir. 1981); Keller v. Dravo Corp., 441 F.2d 1239 (5th Cir. 1971); see also 2A Larson, Workmen's Compensation Law, § 65.20.

The rationale for exclusive remedy provisions was articulated by the New Mexico Supreme Court in Roseberry v. Phillips Petroleum Co., 70 N.M. 19, 21, 369 P.2d 403 (1962):

> The language of the New Mexico statute is very restrictive and all embracing . . . it expressly limits the liability of the employer and abolishes all rights and remedies of every person whomsoever against the employer except as provided by the Act. The basis upon which the Workmen's Compensation Law rests is that it imposes upon the employer an absolute, though limited, liability, not based upon the principle of tort but upon compensation to the injured employee regardless of fault and free from the common-law defenses of assumption of risk, contributory negligence and negligence of a fellow-employee, in exchange for a release from the unlimited liability to which he was theretofore subject upon the theory of negligence . . . .

There is nothing constitutionally impermissible about the New Mexico Exclusive Remedy provision. Although it deprives a person claiming benefits as a result of an industrial accident of remedies at common-law, by statute or otherwise, those remedies are not "property" and there is no denial of due process by enforcing such an exclusive remedy provision. Mondou v. New York, New Haven, & Hartford Railroad Co., 223 U.S. 1 (1912); Keller v. Dravo Corp., 441 F.2d 1239, 1242 (5th Cir. 1971).

The New Mexico Exclusive Remedy provisions also present no equal protection violation. They apply to all persons, citizens or aliens, residents or non-residents. All persons are treated precisely the same under that statute.

Finally, the Exclusive Remedy provisions do not violate the supremacy clause of the Federal Constitution by conflicting with a treaty between the United States and Mexico. The treaty in question, the 1831 Treaty of Amity, Commerce and Navigation between the United States of America and the United Mexican States, 8 Stat. 410, states that citizens of Mexico are to have access to the courts of the United States "on the same terms which are usual and customary with the natives or citizens" of the United States, and that

they "shall enjoy, in every respect, the same rights and privileges, either in prosecuting or defending their rights of personal property, as citizens of the country where the cause may be tried." Since all persons, regardless of citizenship, are equally limited by the Exclusive Remedy provisions, they in no way conflict with the Treaty. The Exclusive Remedy provisions have no greater or lesser application to citizens of Mexico than to citizens of the United States, or for that matter of any other country. There is no violation of the terms of the treaty with Mexico, and hence no violation of the Supremacy Clause. So, too, the Exclusion provision operates no differently on citizens of Mexico than on citizens of the United States. It is, as pointed out previously, a distinction based upon residence, not upon citizenship. The New Mexico Court of Appeals in Perez v. Health and Social Services, 91 N.M. 334, 336, 573 P.2d 689, 691 (1978), noted that an undocumented alien could be a "resident" for purposes of the workmen's compensation law. Conversely, a United States citizen who is a dependent of an injured workman would have no right to recover workmen's compensation benefits if he resides outside of the United States. He is treated no differently under the statute than a citizen of Mexico. Thus, even if the Exclusion question had been preserved as an issue for appeal, it would present no equal protection or supremacy clause issue.

There is nothing unconstitutional about a bona fide residence qualification being imposed as a requirement for obtaining benefits under a state law. This Court's most recent pronouncement on this point was made earlier this month in Martinez v. Bynum, ____ U.S. ____, No. 81-857 (May 2, 1983). The Court in Martinez relied upon prior opinions, including

Memorial Hospital v. Maricopa County, 415 U.S. 250, 255, 267 (1974); Dunn v. Blumstein, 405 U.S. 330 (1972); Shapiro v. Thompson, 394 U.S. 618 (1969), and found a bona fide residence requirement to be constitutionally permissible.

The New Mexico Exclusion provision simply provides that a person, to obtain benefits under the New Mexico Workmen's Compensation Act, be a resident of the United States. It sets no durational requirement, such as those which have been challenged in other cases like Shapiro, supra. Therefore, even if it were properly on appeal, the Exclusion provision would pass constitutional scrutiny. Indeed, what the Appellants seem to seek is not equal protection under the law, but favored treatment. By implication from their argument, the Exclusion should be left in the New Mexico Workmen's Compensation Act, but the Exclusive Remedy provisions should be modified by judicial interpretation to permit non-resident aliens to maintain common-law and statutory causes of action against an employer for death or injury to a workman in an industrial accident. This is a right afforded to neither citizens of the United States nor alien residents in the United States. Such a result would itself conflict with the equal protection requirements of the Fourteenth Amendment.

In short, Appellants' appeal should be dismissed, or the decision of the New Mexico Supreme Court on the Exclusive Remedy provisions of the New Mexico Workmen's Compensation Act should be summarily affirmed. The statute and the decision of the New Mexico Supreme Court are in conformity with the precedents of this Court and others which have considered the question, and both on its face and as applied, the statute makes no impermissible distinction between classes of persons. It violates neither the equal protection clause, the due process clause,

nor the supremacy clause. Insofar as the appeal centers on the Exclusion provision in the New Mexico Workmen's Compensation Act, it should be dismissed, since that claim was abandoned voluntarily by the Appellants before this matter ever came on to trial.

III. CONCLUSION

Appellee respectfully moves this Court either to dismiss this appeal because it seeks to have considered a question which was abandoned in the trial court below, or else to affirm summarily the opinion of the New Mexico Supreme Court since the question preserved for appeal, the validity of the Exclusive Remedy provision, presents issues which are so insubstantial as not to justify further argument and which have previously been resolved by this Court and others.

Respectfully submitted,

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STATE OF NEW MEXICO COUNTY OF BERNALILLO

IN THE DISTRICT COURT

JUAN BARONA and
MARIA SOTO VDA DE TALAMANTES as
co-personal representatives of the
Estate of BERNARDO R. TALAMANTES
a/k/a HECTOR M. BAYLON, Deceased,

Plaintiffs,

vs.

KENT NOWLIN CONSTRUCTION COMPANY, INC.,
MOUNTAIN STATES MUTUAL CASUALTY COMPANY
and PUBLIC SERVICE COMPANY OF NEW MEXICO,

Defendants.

CV-78-03123

No.

CLERK DISTRICT COURT

C O M P L A I N T

COUNT ONE

For Count One of this Complaint, the Plaintiffs state:

I

That they were duly appointed personal representatives of the Estate of Bernardo R. Talamantes a/k/a Hector M. Baylon on March 21, 1978, in the Probate Court of Bernalillo County, Probate No. 78-99.

II

That at all times material herein, Plaintiffs decedent was a resident of Bernalillo County employed by the Defendant Kent Nowlin Construction Company. The incident complained of in this Complaint occurred in Bernalillo County, New Mexico. The Defendant Kent Nowlin Construction Company, Inc., is a New Mexico corporation doing business in Bernalillo County, New Mexico. The Defendant Mountain States Mutual Casualty Company is an insurance carrier doing business in the State of New Mexico and is a compensation carrier for Kent Nowlin Construction Company, Inc. The Defendant Public Service Company of New Mexico is a New Mexico corporation doing business in Bernalillo County, New Mexico.

III

At all times material herein, the decedent was an employee of Kent Nowlin Construction Company, Inc. enjoying average weekly earnings in an amount that would qualify him and his estate to receive maximum Workmen's Compensation benefits.

IV

On or about November 25, 1977, while an employee of the Defendant Kent Nowlin Construction Co., Inc. and in the course and scope of his employment, the decedent suffered death by electrocution as the result of his employers' crane coming in contact with a high line wire at 440 Atrisco, S.W., in Albuquerque, New Mexico.

V

Decedent is survived by his wife, Maria Soto Vda de Talamantes and their six minor children, namely:

1. Maria Talamantes, daughter;
2. Rita Talamantes, daughter;
3. Norma Suzanna Talamantes, daughter;
4. Juan Bernardo Talamantes, son;
5. Antonio Talamantes, son; and
6. Jose Roman Talamantes, son.

VI

Notwithstanding the provisions of Section 59-10-21, N.M.S.A., the widow and children of Bernardo Talamantes are entitled to Workmen's Compensation benefits pursuant ot the New Mexico Workmen's Compensation Ac Such purported limitation in that section is unconstitutional and should be stricken by the court.

VII

Pursuant to Section 59-10-7, N.M.S.A., the plaintiffs are entitled to an increase in compensation based upon the failure of defendant Kent Nowlin Construction Co., Inc. to provide adequate safety devices, e.g., failure to sleeve or insulate the power line and the positioning of the crane within ten feet of an energized power line.

WHEREFORE, the Plaintiffs pray judgment against the Defendants Kent Nowlin Construction Co., Inc. and Mountain States Mutual Casualty Co. for Workmen's Compensation benefits in the amount of $142.60 for a period of 600 weeks and for such other and further relief as the court may deem proper.

COUNT TWO

Come now the Plaintiffs and for Count Two of this Complaint state:

I

Plaintiffs incorporate by reference the factual allegations contained in Count One.

II

In alternative to the allegations contained in Count One, the Plaintiffs state that the Workmen's Compensation Act does not apply to the death of Bernardo R. Talamantes. Plaintiffs are entitled to proceed in common law.

III

On or about November 25, 1975, decedent's employer, Kent Nowlin Construction Company, through their employees, carelessly and negligently operated a crane at 440 Atrisco, S.W. so as to cause it to come in to contact with a high line energized power line. That such negligence more specifically includes, but is not limited to, the following acts of negligence:

1. Failure to notify the power company of activities with the crane;

2. Positioning said crane within ten feet of an energized power line;

3. Failure to sleeve or insulate the power line;

4. Failure to provide a safe place to work and in failing to warn the decedent of hazards attendant with such activities;

5. Failure of the crane operator to keep a proper lookout and avoid contact with said power lines; and,

6. Failure to instruct the decedent concerning how to avoid such injury.

IV

As a direct and proximate result of the negligence of such

employer, Kent Nowlin Construction Company, Bernardo R. Talamantes suffered death by electrocution.

WHEREFORE, the Plaintiffs pray judgment against the Defendant Kent Nowlin Construction Company, Inc. for damages in the sum of $225,000.00, plus costs of this action and such other relief as the court may deem proper.

COUNT THREE

As Count Three of this Complaint, the Plaintiffs state:

I

That they incorporate by reference the factual allegations contained in Count One and Count Two as though fully set forth herein.

II

That the Defendant Public Service Company of New Mexico negligently maintained the power line at 440 Atrisco, S.W., in Albuquerque, New Mexico, and as a direct and proximate cause and result of such negligence, Bernardo R. Talamantes died from electrocution.

III

That this Defendant's negligence referred to above, is more specifically described as including, but not limited to:

1. Maintaining the power line at lower than minimum standards;

2. Failure to advise persons in the vicinity of said power line of the dangers attendant to such activity;

3. Failure to take steps to avoid electrocution contact;

4. Failure to insulate such power line; and,

5. The creation of such a maze of wires at different levels, different heights and different directions so as to confuse and subject persons in the vicinity of said high line wires to injury.

WHEREFORE, the Plaintiffs pray judgment against the Defendant Public Service Company of New Mexico for damages in the amount of $225,000.00, plus costs of this action and such other relief as the court may deem proper.

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STATE OF NEW MEXICO COUNTY OF BERNALILLO

IN THE DISTRICT COURT

JUAN BARONA and MARIA SOTA VDA DE TALAMANTES as co-personal representatives of the Estate of BERNARDO TALAMANTES a/k/a HECTOR M. BAYLON, Deceased,

Plaintiffs,

v.

No. CV 78-3123

KENT NOWLIN CONSTRUCTION COMPANY, INC., MOUNTAIN STATES MUTUAL CASUALTY COMPANY and PUBLIC SERVICE COMPANY OF NEW MEXICO,

Defendants.

ENDORSED
FILED IN MY OFFICE THIS
AUG 6 1980
DISTRICT COURT

MOTION TO AMEND COMPLAINT

COME NOW the Plaintiffs and move this Court to allow Plaintiffs to amend their complaint to dimiss Mountain States Mutual Casualty Company as a party, dismiss the Workmen's Compensation count against Defendant Kent Nowlin Construction Company, and add a negligence per se charge against Defendant Kent Nowlin Construction Company.

As grounds therefor, Plaintiffs state:

1. In light of the recent New Mexico Supreme Court case, Pedrazza v. Sid Fleming Contractor, Inc., Vol. 19, No. 10, March 6, 1980 (Sup. Ct. No. 12, 389), a Workmen's Compensation case which appears to hold that a non-resident of the United States was not intended by the legislature to receive Workmen's Compensation benefits, Plaintiffs as residents and citizens of Mexico dismiss the Workmen's Compensation count of their complaint against Defendant Kent Nowlin and consequently against Kent Nowlin's Workmen's Compensation carrier, Mountain States Mutual Casualty Company.

2. Plaintiffs further amend to add a negligence per

se charge to their complaint for Kent Nowlin's failure to comply with the Hours of Labor and Safety on Public Works Act, 40 USC, §327-333.

Respectfully submitted,

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By: Will H Carpenter

I hereby certify that a true copy of the foregoing was mailed to all counsel of record this 2 day of July, 1980.

By: Will H Carpenter

STATE OF NEW MEXICO COUNTY OF BERNALILLO

IN THE DISTRICT COURT

ESTELA E. GUTIERREZ and
MARIA SOTO VDA DE TALAMANTES as
co-personal respresentatives of the
estate of BERNARDO R. TALAMANTES
a/k/a HECTOR M. BAYLON, Deceased

No. CV-78-3123

Plaintiffs,

ENDORSED
FILED IN MY OFFICE THIS
AUG 6 1980
CLERK DISTRICT COURT

VS.

KENT NOWLIN CONSTRUCTION COMPANY,

Defendant.

FIRST AMENDED COMPLAINT

COMES NOW the Plaintiffs and for their cause of action state:

I.

That they were duly appointed personal representatives of the Estate of Bernardo R. Talamantes a/k/a Hector M. Baylon on March 21, 1978, in the Probate Court of Bernalillo County, Probate No. 78-99.

II.

That at all times material herein, Plaintiffs' decedent was a resident of Bernalillo County, New Mexico. Defendant Kent Nowlin Construction Company, is a New Mexico Corporation doing business in Bernalillo County, New Mexico.

III.

That on or about November 25, 1977, while an employee of the Defendant Kent Nowlin Construction Company, the

decedent suffered death by electrocution as the result of his employers' crane coming in contact with a high line wire at 440 Atrisco S.W., in Albuquerque, New Mexico.

Defendant Kent Nowlin Construction Company was the contractor for the City of Albuquerque for the purpose of constructing and repairing a public road in Albuquerque, New Mexico, at the time and place of decedents death.

IV.

Defendant Kent Nowlin Construction Company required Plaintiff, a laborer and employee, to work in surroundings hazardous and dangerous to his health and safety in violation of the Hours of Labor and Safety on Public Works Act, 40USC§327-333, and as set forth more specifically within the regulations of this Act, 44 Fed. Reg. 8577-8640, February 9, 1979. Defendants' violations of this act include, but are not limited to the following:

1. Failure to train, instruct and educate the Plaintiff in the recognition, and avoidance and prevention of unsafe conditions,

2. Failure to conspicuously post hazard warnings and instructions on the crane,

3. Failure to deenergize and visably ground electrical lines or erect an insulated barrier to prevent contact with such lines,

4. Failure to maintain a distance of 10 feet between the power lines and the crane,

5. Failure to designate an employee to observe clearance to maintain the desired distance,

6. Failure to provide safety and warning devices such as boom guards, insulating links, or proximity warning devices.

V.

The failure of Defendant Kent Nowlin Construction Company to comply with the provisions of the Hours of Labor and Safety on Public Works Act and the regulations promulgated pursuant to that Act constitutes negligence per se.

VI.

Apart from the statutory violation, employees of Defendant, acting within the course and scope of their employment, were otherwise negligent with such negligence consisting, inter alia, of the following:

1. Failure to notify the power company of activities with the crane;

2. Positioning said crane within ten feet of an energized power line;

3. Failure to sleeve or insulate the power line;

4. Failure to provide a safe place to work and in failing to warn the decedent of hazards attendant with such activities;

5. Failure of the crane operator to keep a proper lookout and avoid contact with said power lines;

6. Failure to provide sufficient number of workmen to avoid injury, including the use of a spotter;

7. Failure to provide safe and proper equipment

8. Failure to instruct and warn the decedent concerning how to avoid such injury.

As a direct and proximate result of the negligence of such employer, Kent Nowlin Construction Company, Bernardo R. Talamantes suffered death by electrocution.

WHEREFORE, the Plaintiffs pray judgment against the Defendant Kent Nowlin Construction Company for damages in the sum of $325,000.00, plus cost of this action and such other relief as the court may deem proper.

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BY: William H. Carpenter

I Hereby certify that a true copy of the foregoing was mailed to the opposing counsel of record on this _____ day of _____, 19_____.

WILLIAM H. CARPENTER

STATE OF NEW MEXICO COUNTY OF BERNALILLO

IN THE DISTRICT COURT

ENDORSED
FILED IN MY OFFICE THIS
AUG 6 1980
CLERK DISTRICT COURT

JUAN BARONA and MARIA SOTA VDA DE TALAMANTES as co-personal representatives of the Estate of BERNARDO TALAMANTES a/k/a HECTOR M. BAYLON, Deceased,

Plaintiffs,

v. No. CV 78-3123

KENT NOWLIN CONSTRUCTION COMPANY, INC., MOUNTAIN STATES MUTUAL CASUALTY COMPANY and PUBLIC SERVICE COMPANY OF NEW MEXICO,

Defendants.

ORDER

This matter having come before the Court on Plaintiff's Motion to Amend Complaint, and the Court having been fully advised, finds that as a result of the death by electrocution on November 25, 1977, of Bernardo R. Talamantes, a/k/a Hector M. Baylon, Mountain States Mutual Casualty Company on its behalf and on behalf of the employer, Kent Nowlin Construction Company, Inc., paid $1515 for medical and funeral expenses, and the Court further finding that good cause exists for the filing of a First-Amended Complaint alleging additional grounds for negligence against Defendant Kent Nowlin Construction Company, Inc., it is therefore

ORDERED:

1. That all claims by the Plaintiffs for death benefits under the New Mexico Workmen's Compensation Act be, and they hereby are, dismissed with prejudice; and

2. That Plaintiffs be, and they hereby are, allowed to file an Amended Complaint against Defendant Kent Nowlin Con-

struction Company, Inc., alleging additional grounds of negligence.

JACK L. LOVE
DISTRICT COURT JUDGE

Approved as to form:

WILLIAM H. CARPENTER
Attorney for Plaintiffs

MODRALL, SPERLING, ROEHL, HARRIS & SISK

By
JAMES A. PARKER
Attorneys for Defendants
Kent Nowlin Construction Co., Inc.
and Mountain States Mutual Casualty Co.